

FEDERAL ELECTION COMMISSION

999 E Street, N.W.  
Washington, D.C. 20463

1999 DEC 13 P 2

FIRST GENERAL COUNSEL'S REPORT

**SENSITIVE**

Audit Referral: 99-02  
Date Activated: June 9, 1999  
  
SOL Expiration: February 23, 2000<sup>1</sup>  
Staff Member: Albert R. Veldhuyzen

SOURCE: INTERNALLY GENERATED

RESPONDENTS: Metropolitan Life Insurance Company Employees'  
Political Participation Fund A  
Robert C. Tarnok, as Treasurer

RELEVANT STATUTES/REGULATIONS:

2 U.S.C. § 432(c) and (d)  
2 U.S.C. § 434(a)(4)  
28 U.S.C. § 2462  
11 C.F.R. § 102.9(c) and (d)  
11 C.F.R. § 104.14(b)(1) and (b)(3)  
11 C.F.R. § 114.5(a)(1)

INTERNAL REPORTS CHECKED: Audit Documents

FEDERAL AGENCIES CHECKED: None

**I. GENERATION OF MATTER**

Audit Referral 99-02 was generated by an audit of Metropolitan Life Insurance Company Employees' Political Participation Fund A ("Metlife") and Robert C. Tarnok, as Treasurer, undertaken in accordance with 2 U.S.C. § 438(b). The Audit Division's referral materials are attached. Attachment 1. The audit, which covered the period January 1, 1995 through December

<sup>1</sup> The statute of limitations date for the earliest violative activity in this matter is February 23, 2000 for Metlife's first report which it filed on February 23, 1995 without maintaining adequate supporting records. The statute of limitations date for the last report filed in this matter is January 29, 2002.

31, 1996, revealed that Metlife did not preserve numerous payroll deduction authorization forms necessary to support disclosure reports filed with the Federal Election Commission.<sup>2</sup>

## II. FACTUAL AND LEGAL ANALYSIS

### A. LAW

A political committee is required to file reports detailing receipts and disbursements with the Commission in accordance with 2 U.S.C. § 434(a)(4). These reports must be "available for audit, inspection, or examination by the Commission or its authorized representative(s) for a period of not less than 3 years after the report or statement is filed." 11 C.F.R. § 104.14(b)(3).

In addition to the reports, the political committee must also maintain the underlying records upon which the reports are based. 11 C.F.R. § 104.14(b)(1). Specifically, each political committee or person filing reports is required to:

Maintain records, including bank records, with respect to the matters required to be reported, including vouchers, worksheets, receipts, bills and accounts, which shall provide in sufficient detail the necessary information and data from which the filed reports and statements may be verified, explained, clarified, and checked for accuracy and completeness. *Id.*

Among the items that the treasurer of a political committee must keep are records of contributions and disbursements, such as receipts, canceled checks, and monthly billing statements. 11 C.F.R. §§ 102.9(a), 102.9(b)(2). These must be kept for three years after the report to which such records and accounts relate is filed. 11 C.F.R. § 102.9(c); *see also* 2 U.S.C. § 432(d).

<sup>2</sup> The preservation of payroll deduction authorization forms by political committees is currently a second priority Commission rulemaking project. *See* Regulations Status Memo, Agenda Document No. 99-128, Appendix B at 5 (Nov. 10, 1999); Regulations Priorities Memo, Agenda Document No. 99-114 at 2 (Oct. 21, 1999).

In the performance of recordkeeping duties, a treasurer shall use his or her "best efforts to obtain, maintain and submit the required information and shall keep a complete record of such efforts." 11 C.F.R. § 102.9(d). If there is a showing of best efforts, records of a committee are considered in compliance with the Federal Election Campaign Act of 1971, as amended ("the Act"). *Id.* If a treasurer does not make at least one written effort to obtain a duplicate copy of a receipt, invoice, or canceled check, he or she "will not be deemed to have exercised best efforts to obtain, maintain and submit the records." *Id.*

## B. ANALYSIS

From January 1, 1995 to December 31, 1996, Metlife received contributions from individuals totaling approximately \$353,300, the majority of which were collected through payroll deduction. In the course of conducting its audit, the Audit Division discovered that Metlife had failed to maintain all payroll deduction authorization forms prior to 1995.<sup>3</sup> Those that were available were dated between 1995 and 1997. As a result, there was no substantiation for 53% of the items listed in the February 1995 through January 1997 Metlife financial disclosure reports. Attachment 1 at 2.

The Interim Audit Report recommended that, within 30 days, Metlife locate the missing employee payroll deduction authorizations or obtain written confirmations from contributors. Attachment 2 at 4. Metlife's attorney objected to the request, arguing that "nowhere in that rule [11 C.F.R. § 104.14(b)], or anywhere else in the FEC regulations, are PACs required to keep records of Authorization Forms." Attachment 3 at 2.

<sup>3</sup> Metlife representatives informed the Audit staff that the forms were apparently lost as a result of a personnel change in the payroll office — the forms were presumably put into storage and Metlife has not been able to locate them. There is no indication that Metlife intentionally discarded the authorization forms.

While it is true that the regulations do not specifically mention payroll deduction authorization forms, the language of 11 C.F.R. § 104.14(b)(1) is not exhaustive. The items listed merely cite examples of records that must be maintained to verify the accuracy and completeness of disclosure reports. Because the list in 11 C.F.R. § 104.14(b)(1) is preceded by the term "including," political committees may be required to maintain records other than those specifically listed as long as they are necessary to verify, explain, and clarify the filed reports for accuracy and completeness. *See* 11 C.F.R. § 104.14(b)(1). *See also* Singer, Sutherland Statutory Construction § 45 (5th ed. 1992) (in statutory construction, the doctrine of *expressio unius* states that a list within a statute is deemed exhaustive unless there is language to indicate otherwise).

The authorization forms, which are used to implement employee payroll deductions, provide the necessary information needed to verify the accuracy and completeness of the filed reports because they include the contributor's name, the amount and date of the contribution, the type of contribution, and the contributor's signature. *See* Attachment 4 (Metlife payroll deduction authorization form). The forms confirm the truth of the information submitted in the disclosure reports and serve as a record of the contributors' donative intent. They are also indicative of donative intent for subsequent contributions. Because authorization forms support the legitimacy of multiple contributions (rather than a single contribution), they are especially important to keep for verification purposes. *Accord* Advisory Opinion ("AO") 1999-3.<sup>4</sup>

<sup>4</sup> In AO 1999-3, Microsoft PAC requested guidance regarding the use of digital electronic signatures to authorize payroll deduction of contributions. The Commission advised Microsoft PAC that, whether in paper document or electronic record format, the payroll deduction authorization must be maintained for three years from the filing date of each PAC report on which a contribution pursuant to that authorization is disclosed. The employee making the contribution must be able to use an electronic or written signature to revoke or modify the amount of the authorization at any time and a record of the authorizing signature must be maintained in a retrievable manner so as to be available for review by the Commission in the event of an audit or investigation.

In addition, authorization forms provide an indication that the contribution was voluntary, made without the threat of physical force, job discrimination, or financial reprisal. *See* 11 C.F.R. § 114.5(a)(1). Payroll deduction plans for political contributions which may result in involuntary or unintentional contributions are not permissible.<sup>5</sup> *See FEC v. NEA*, 457 F. Supp. 1102 (D.D.C. 1978). Without a record of each payroll deduction authorization form, the Commission cannot verify whether Metlife asked the employees beforehand whether they wanted contributions deducted from their pay. Authorization forms must be kept because they confirm the voluntariness of the transactions and rule out that political contributions were required as a condition of membership or employment. *See* 11 C.F.R. § 114.5(a)(1).

Furthermore, because payroll deduction authorization forms are records that support disclosure reports, they must be kept for three years from the date of the report — not three years from the date of the authorization form.<sup>6</sup> 11 C.F.R. §§ 102.9(c); 104.14(b)(3). *Accord* AOs 1999-3 and 1999-6. The assertion that authorization forms older than three years may be thrown away systematically is contrary to the wording of 11 C.F.R. § 102.9(c).

<sup>5</sup> *FEC v. NEA* involved a "reverse check-off" method of payroll deduction under which a teacher signing an NEA membership application automatically agreed to a one dollar political contribution deduction in addition to a deduction for union dues. The only recourse for the teacher not wishing to make a political contribution was to request a refund. The court held that contributions above and beyond normally assessed union dues for the purpose of funding a political action committee could not be collected through reverse check-off. The decision did not preclude payroll deduction plans for political contributions — it simply required that the union member be "asked beforehand if he wants a contribution to be deducted along with his dues." *FEC v. NEA*, 457 F. Supp. 1102, 1109 (D.D.C. 1978). At issue was a separate payroll deduction for political advocacy — neither this report nor the decision in *FEC v. NEA* address the political use of union dues.

<sup>6</sup> Under 11 C.F.R. § 102.9(c), authorization forms older than three years must be maintained as long as they continue to support disclosure reports. Therefore, if an individual continues to contribute for 10 years, for example, his original 10-year old authorization form should be available for inspection if it supports any filed disclosure report less than three years old.

Payroll deduction forms are "records" necessary to verify, explain, and clarify the filed reports — Metlife collected and maintained such records until their loss. Consequently, Metlife appears to have been aware of the importance of keeping and obtaining the required records.

A political committee is required to use best efforts to maintain and submit required information to the Commission. 11 C.F.R. § 102.9(d). The communications between the Audit Division and Metlife indicate that the latter was not aware that the pre-1995 authorization forms were missing until the audit. Although the Commission subsequently recommended that Metlife locate the missing records or obtain new confirmations from contributors, Metlife objected in writing. See Attachment 2 at 4; Attachment 3. Because Metlife's treasurer did not make at least one written effort to obtain a duplicate copy of each missing authorization form even after the Commission's recommendation that it do so within 30 days, it appears that Metlife did not use its best efforts to maintain the required records.<sup>7</sup> See 11 C.F.R. § 102.9(d).

Accordingly, the Office of General Counsel recommends that the Commission find reason to believe that Metlife, and Robert C. Tarnok, as Treasurer, violated 2 U.S.C. § 432(d) by failing to preserve all records required by the Federal Election Campaign Act.

### **III. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

The Office of General Counsel recommends that the Commission offer to enter into conciliation with Metlife prior to a finding of probable cause to believe. Attached for the Commission's approval is the proposed conciliation agreement

<sup>7</sup> On August 31, 1999, six months after the Commission approved the final audit report, and one year after the interim audit report, the Metlife Treasurer informed the Audit staff that letters were mailed out six weeks prior requesting the missing information and that there was an 82% response. As a result, a second mailing was done for the 18% who did not respond. At the end of November, the Metlife Treasurer informed the Audit staff that Metlife had completed the second mailing and had obtained a response rate of 90 percent.

IV. **RECOMMENDATIONS**

1. Open a MUR.
2. Find reason to believe that Metropolitan Life Insurance Company Employees' Political Participation Fund A, and Robert C. Tarnok, as Treasurer, violated 2 U.S.C. § 432(d).
3. Enter into conciliation with Metropolitan Life Insurance Company Employees' Political Participation Fund A, and Robert C. Tarnok, as Treasurer, prior to a finding of probable cause to believe.
4. Approve the attached proposed Conciliation Agreement.
5. Approve the attached factual and legal analysis.

6. Approve the appropriate letters.

Lawrence M. Noble  
General Counsel

12/10/99  
Date

BY:

Kim Bright-Coleman  
Kim Bright-Coleman  
Associate General Counsel

**Attachments**

1. Referral of the Audit Division dated March 1, 1999.
2. Interim Report of the Audit Division dated August 21, 1998.
3. Metlife's Response to the Interim Audit Report dated November 20, 1998.
4. Metlife Sample Payroll Deduction Authorization Form.
5. Proposed Factual and Legal Analysis.
6. Proposed Conciliation Agreement.



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TORONTO

November 20, 1998

VIA HAND DELIVERY

Mr. Robert J. Costa  
Assistant Staff Director  
Audit Division  
Federal Election Commission  
999 E Street, NW  
Washington, D.C. 20463

Re: Response to Interim Audit Report -  
Metropolitan Life Insurance Company Employees'  
Political Participation Fund

Dear Mr. Costa:

This is in response to the Interim Audit Report ("Report") which you sent to Metropolitan Life Insurance Company Employees' Political Participation Fund ("MetLife PAC") in a letter dated October 21, 1998. Specifically, the Report contained the Audit Division's findings and recommendations from an audit of MetLife PAC covering a period between January 1, 1995 through December 31, 1996. The Report contained only one finding -- that MetLife PAC did not have on file 53% of the payroll deduction authorization forms ("Authorization Forms") signed by employees who contributed to the PAC through payroll deductions during the audit period. The Report also recommended that MetLife PAC either locate those missing forms or obtain written confirmations from the payroll deductees stating they signed the forms. Although we have been informed by the Audit Division staff that the Commission has already considered the Authorization Form recordkeeping issue in the Report, this is the first time that MetLife PAC has been provided a chance to submit a formal response to the proposed finding. We appreciate the opportunity to do so.

There is no legal basis for the Report's finding or recommendations. The Report relies on 11 C.F.R. § 104.14(b) which requires a PAC to maintain for three years records, "including vouchers, worksheets, receipts, bills and accounts," which provide in sufficient detail the necessary information to verify the reports which the PAC filed with the FEC. However, nowhere in that rule, or anywhere else in the FEC regulations, are PACs required to keep records of Authorization Forms. Indeed, such forms are not necessary to verify the accuracy of a PAC's report. Commission staff orally confirmed this to us on two separate occasions -- once in a conversation with a FEC information specialist and the other during a conversation with a field auditor who worked on MetLife PAC's audit. In the absence of a statutory or regulatory provision, the Commission cannot require MetLife PAC to keep records of Authorization Forms unless it promulgates a rule creating such requirement. Specifically, the Federal Election Campaign Act of 1971, as amended, ("FECA") provides that "[a]ny rule of law which is not stated in this Act . . . may be initially proposed by the Commission only as a rule or regulation." 2 U.S.C. § 437f(b) (emphasis added).

Also, we recognize that the Commission has in the past prohibited payroll deduction plans which result in involuntary contributions. See, FEC v. National Education Ass'n ("NEA"), 457 F. Supp. 1102, 1106-1107 (D.C.D.C. 1978) (the FEC prohibited a reverse check-off plan because it captured involuntary contributions). However, the Commission did so because the Federal Election Campaign Act of 1971, as amended, ("FECA") and the FEC rules prohibit the solicitation of involuntary contributions. Id.; see also 2 U.S.C. § 441b(b)(3); 11 C.F.R. § 114.5. As discussed above, they do not require a PAC to maintain records of Authorization Forms. Indeed, it is inappropriate and outside the scope of the NEA decision to bootstrap a recordkeeping requirement on a prohibition against involuntary contributions.

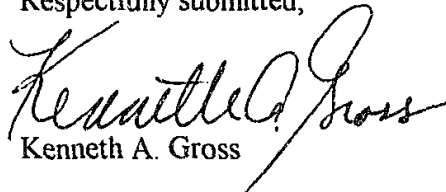
It is important to note that although not required by law, MetLife PAC maintained the Authorization Forms going back three years. As confirmed in the Report, MetLife PAC has on file Authorization Forms "dated between 1995 and 1997" and is only missing Authorization Forms signed before 1995. Thus, even if MetLife was required to keep payroll authorization forms, nothing specifies that those records must be maintained for more than three years. The forms signed within the last three years for either new entrants or changes to prior authorizations are on record. The auditors are now seeking forms they have no authority to demand under

Mr. Robert J. Costa  
November 20, 1998  
Page 3

the rules, outside the time for maintaining any records, and outside the coverage dates of the audit.

For the above reasons, the Commission should delete from the Final Audit Report the finding regarding MetLife PAC's failure to keep records of Authorization Form. If the Commission desires PACs to maintain records of payroll deduction authorization forms, particularly those beyond the three year period in Section 104.14(b), we suggest that the Commission amend its regulations to specify that payroll deductions authorization forms must be maintained and because of the continuing nature of payroll deduction, further specify the retention period for those forms.

Respectfully submitted,

  
Kenneth A. Gross

cc: Commissioners  
General Counsel

Discontinue Earmarking

**MetLife**

One Madison Avenue, New York, NY 10010-3690

April 17, 1998

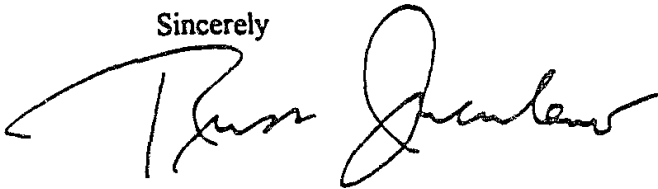
To Members of MetLife's Political Action Committee

The Fund A Steering Committee of MetLife's Political Action Committee has voted to discontinue the practice of accepting PAC contributions that are earmarked for individual candidates or committees. This practice has been creating technical difficulties in our complying with certain federal and state laws.

We urge those Members who have been making earmarked contributions to instead continue to contribute the same amount to the PAC. Your contributions will be used to assist candidates and committees that are carefully selected by the PAC officers and Steering Committee. By being offered collectively with other PAC funds, your individual contribution can make a greater impact. Therefore, we urge you to re-direct your contribution to be made payable to MetLife's PAC. To make this effective by automatic payroll deduction, please check the appropriate box in the attached form and send it to Elaine Fiorio, Area 12-E in the Home Office.

Of course, you still have the option to make direct political contributions to the recipient of your choice. However, in either case, Members who have been making earmarked contributions by means of MetLife's automatic payroll deduction system must take some action with respect to the attached form. We hope that you choose to participate in the PAC where your contribution will help further MetLife's legislative agenda.

Sincerely



Russel P. Iuculano  
Chairman  
Fund A

Metropolitan Life Insurance Company (MetLife) Employees' Political Participation Funds

# Metropolitan Employees' Political Participation Fund A

## Membership Application and Payroll Deduction Authorization

Name \_\_\_\_\_ Title \_\_\_\_\_  
 Last Name First Name Middle Initial  
 Company Name \_\_\_\_\_  
 No. and Street City State Zip Code  
 Residence Address \_\_\_\_\_  
 No. and Street City State Zip Code  
 Business Address \_\_\_\_\_  
 No. and Street City State Zip Code  
 Social Security No. \_\_\_\_\_ Employee Identification No. \_\_\_\_\_  
☐ Home Office  
☐ Other \_\_\_\_\_  
 Agency \_\_\_\_\_ Index \_\_\_\_\_ Department \_\_\_\_\_  
 Territory \_\_\_\_\_ Region \_\_\_\_\_ Branch/District No. \_\_\_\_\_ Branch/District Name \_\_\_\_\_

Please Call Home Office Extension 5588 if you have any questions regarding the completion of this form

(Check the Appropriate Boxes. Do not fill in shaded areas.)

☐ New Payroll Deduction ☐ Revised Payroll Deduction

I authorize Metropolitan to deduct the following amount from my compensation each pay period and pay that amount to the Treasurer of Fund A:

Fund A (Federal and States other than New York)

☐ \$ \_\_\_\_\_ or ☐ \_\_\_\_\_ % (1/4, 1/2, or 3/4 of 1%) \*

\* The amount of your contribution under this system will be updated as your salary increases. The amount deducted will be rounded to the nearest even dollar amount. In addition, please note that administratively it is not feasible for those paid weekly or by commission to index their contributions.

☐ Lump Sum Contribution

I am enclosing my check(s) for \$ \_\_\_\_\_ as my contribution, payable to you as Treasurer, Metropolitan Employees' Political Participation Fund A (Federal and States other than New York)

☐ Termination of Authorization

I hereby request discontinuance of deductions being made from my salary for political contributions.

Signed \_\_\_\_\_ Date \_\_\_\_\_ Business Telephone \_\_\_\_\_ Ext. \_\_\_\_\_

DEDCT

Do Not Complete - Input Area Use Only

P A C							
DED Type Code	Status	Amount	Percentage	Company Code			


Admin. P/R Use Only		INPUT AREA USE ONLY					
Work	Assign	Input By	Date	EFF	P/R	Date	Office Code



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

MEMORANDUM

TO: Lawrence M. Noble  
General Counsel

FROM: Mary W. Dove/Lisa R. Davis  
Acting Commission Secretary 

DATE: December 16, 1999

SUBJECT: Audit Referral 99-02 - First General Counsel's Report  
dated December 10, 1999.

The above-captioned document was circulated to the Commission  
on Monday, December 13, 1999.

Objection(s) have been received from the Commissioner(s) as  
indicated by the name(s) checked below:

Commissioner Elliott	<u>XXX FOR THE RECORD</u>
Commissioner Mason	—
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Thomas	—
Commissioner Wold	—



# FEDERAL ELECTION COMMISSION

Washington, DC 20463

## MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel *KCS*

DATE: December 13, 1999

SUBJECT: Audit Referral 99-02-First General Counsel's Report

The attached is submitted as an Agenda document for the Commission Meeting of \_\_\_\_\_

Open Session \_\_\_\_\_

Closed Session \_\_\_\_\_

### CIRCULATIONS

SENSITIVE

☒

NON-SENSITIVE

☐

72 Hour TALLY VOTE ☒

24 Hour TALLY VOTE ☐

24 Hour NO OBJECTION ☐

INFORMATION ☐

### DISTRIBUTION

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REGULATIONS ☐

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